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**IN THE
COURT OF APPEALS OF INDIANA**

RAMAYEL CAIN,

Appellant-Petitioner,

VS.

STATE OF INDIANA,

Appellee-Respondent.

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No. 49A04-0606-PC-330

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Grant Hawkins, Judge
Cause No. 49G05-0311-FB-194113

March 20, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Ramayel Cain appeals his conviction for Rape,¹ a class B felony. On direct appeal, he presents the following restated issue for review: Did the State present sufficient evidence that the alleged victim was unaware, within the meaning of I.C. § 35-42-4-1(a)(2), that the sexual intercourse was occurring?

We reverse.²

The facts most favorable to the judgment reveal that on Saturday, June 22, 2002, Cain called A.C. to ask if she was interested in going to a party that evening with him and Reginald Carter. A.C. had recently graduated from high school with Cain and Carter. While she had known both of them through school for several years, A.C. had never dated either of them. A.C. agreed to attend the party and called her friend Shanel Ward to accompany them.

A.C. and Ward followed Cain and Carter in a separate car (Ward's car) to the party. They also picked up another friend, Tiffany Bridges, who followed in her own car. The group made several additional stops along the way, including a liquor store to purchase a half-gallon of gin and a gas station to purchase individual bottles of orange juice. After briefly stopping in a parking lot to mix and drink some gin and orange juice,

¹ Ind. Code Ann. § 35-42-4-1(a) (West 2004).

² We note that Cain used the *Davis/Hatton* procedure as outlined in Ind. Appellate Rule 37 to stay his direct appeal and pursue a petition for post-conviction relief in the trial court. *See Schlabbach v. State*, 842 N.E.2d 411 (Ind. Ct. App. 2006) (citing *Davis v. State*, 267 Ind. 152, 368 N.E.2d 1149 (1977) and *Hatton v. State*, 626 N.E.2d 442 (Ind. 1993)), *trans. denied*. In this consolidated appeal, therefore, Cain also challenges the denial of his petition for post-conviction relief, in which he alleged ineffective assistance of trial counsel. Because we reverse on sufficiency grounds, we need not address the post-conviction issues.

the group proceeded to the party, which was at a house off of Spring Mill Road in Indianapolis.

At the party, A.C. sat in the back yard with Ward and drank a considerable amount of alcohol. In addition to the gin and orange juice mixture, A.C. consumed one or two Jell-O shots and participated in two rounds of a drinking game involving various types of alcohol. A.C. eventually began to feel dizzy, which she told Ward and Cain. A.C. and Cain then walked to his car. A.C. got into the backseat, where she continued to feel dizzy and sick. She sat in the car for a while with Cain and talked, though she cannot remember what they talked about. Ward, who was also intoxicated, eventually came to the car. A.C. told Ward she wanted to go, and Cain assured Ward that he would take A.C. home. At some point before Ward left, an intoxicated Carter also came to the car, cussing and talking about wanting to “beat up some white boy.” *The Exhibits* at 140.

A.C. did not “remember much” after Ward left. *Id.* at 138. She felt really sick and “it just seemed like everything went black.” *Id.* at 139. The next thing A.C. remembered was Cain “getting off” her with a condom on, his pants down, and one of her legs out of her pants. *Id.* A.C. testified, “it felt like we had had sex.” *Id.* at 158. A.C. further testified that she could not remember whether she consented to sexual intercourse with Cain, though she acknowledged it was possible. After the sexual encounter with Cain, A.C. pulled her pants back on and remained in the backseat, as Cain exited the car.³

³ In its statement of facts, the State directs us to evidence regarding a subsequent forcible rape of A.C. by Carter, Cain’s co-defendant at trial. This evidence, however, is not relevant to the issue of A.C.’s state of consciousness during the sexual intercourse with Cain. Indeed, the State does not even address this evidence in its sufficiency argument.

Soon thereafter, Cain drove A.C. home. She walked into her house, took her clothes off, and went to bed. About twenty-four hours later, A.C. went to the hospital where a sexual assault exam was conducted. She decided to press charges a day or so after the exam. DNA evidence later supported A.C.'s belief that she had had sexual intercourse with Cain at the party.

On November 7, 2003, the State charged Cain with rape for having sexual intercourse with A.C. while she was unaware the sexual intercourse was occurring. A bench trial was held on September 9, 2004, at which the State presented the testimony of A.C., as well as brief testimony from the sexual assault nurse who examined her at the hospital. Thereafter, Cain presented the testimony of a fellow partygoer, Tiffany Bridges. The theory of Cain's defense was that the sexual intercourse was consensual or, more precisely, that the State had failed to establish beyond a reasonable doubt that A.C. was passed out and in "such a state that her body could have been used without her knowledge or her consent." *The Exhibits* at 192. At the conclusion of the trial, the court found Cain guilty as charged. On appeal, Cain contends the State failed to present sufficient evidence that A.C. was unaware the sexual intercourse was occurring.

When reviewing claims of insufficiency of the evidence, we do not reweigh the evidence or assess the credibility of witnesses. *Chatham v. State*, 845 N.E.2d 203 (Ind. Ct. App. 2006). Rather, we look to the evidence and the reasonable inferences that may be drawn therefrom that support the conviction. *Id.* We will affirm if there exists evidence of probative value from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. *Id.* "While we seldom reverse for insufficient

evidence, in every case where that issue is raised on appeal, we have an affirmative duty to make certain that the proof at trial was, in fact, sufficient to support the verdict beyond a reasonable doubt.” *Moore v. State*, 845 N.E.2d 225, 228 (Ind. Ct. App. 2006), *trans. denied*. “Evidence that only tends to support a conclusion of guilt is insufficient to sustain a conviction, as evidence must support the conclusion of guilt beyond a reasonable doubt.” *Whitaker v. State*, 778 N.E.2d 423, 425 (Ind. Ct. App. 2002), *trans. denied*.

Class B felony rape is statutorily defined as follows:

[A] person who knowingly or intentionally has sexual intercourse with a member of the opposite sex when:

- (1) the other person is compelled by force or imminent threat of force;
 - (2) the other person is unaware that the sexual intercourse is occurring; or
 - (3) the other person is so mentally disabled or deficient that consent to sexual intercourse cannot be given;
- commits rape, a Class B felony.

I.C. § 35-42-4-1(a). Cain was charged under subsection (2) of the statute, as the State alleged A.C. was unaware the sexual intercourse was occurring.

In *Becker v. State*, 703 N.E.2d 696 (Ind. Ct. App. 1998), a case involving a sleeping victim, we examined the term “unaware” under an analogous provision of the criminal deviate conduct statute, I.C. § 35-42-4-2(a)(2) (West 2004):

The term “unaware” has not been defined by the legislature. In such circumstances, penal statutes are to be strictly construed against the State and should be held to prohibit only that conduct which is clearly within the spirit and letter of the statutory language. *Marshall v. State*, 602 N.E.2d 144, 147 (Ind. Ct. App. 1992), *trans. denied*. However, criminal statutes are not to be narrowed to the point that they exclude cases which the

language fairly covers. *Barger v. State*, 587 N.E.2d 1304, 1306 (Ind. 1992). Penal statutes should be interpreted in order to give efficient operation to the expressed intent of the legislature. *Id.* Words and phrases are taken in their plain, ordinary, and usual meaning unless a different purpose is manifested by the statute. *JKB, Sr. v. Armour Pharmaceutical Co.*, 660 N.E.2d 602 (Ind. Ct. App. 1996), *trans. denied*. Statutes relating to the same general subject matter are in *pari materia* and should be construed together so as to produce a harmonious statutory scheme. *Sanders v. State*, 466 N.E.2d 424, 428 (Ind. 1984).

“Unaware” is defined as “not aware: lacking knowledge or acquaintance: UNCONSCIOUS.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 2483 (1986 ed.). We have noted that a person is unconscious during sleep. *See Brooks v. Bloom*, 151 Ind. App. 312, 279 N.E.2d 591, 595 (1972).

Moreover, it is the general, if not universal, rule that if a man has intercourse with a woman while she is asleep, he is guilty of rape because the act is without her consent.

Becker v. State, 703 N.E.2d at 698.

Thereafter, in *Glover v. State*, 760 N.E.2d 1120 (Ind. Ct. App. 2002), *trans. denied*, we addressed the term “unaware” in the context of the rape statute and expressly adopted the definition as set out in *Becker*. With respect to a vagueness challenge, we then held that “the language of the Rape statute may be fairly construed as adequate to inform an individual of ordinary intelligence that sexual intercourse with an individual who has lost consciousness due to inebriation is proscribed.” *Glover v. State*, 760 N.E.2d at 1124. Similarly, we rejected the defendant’s sufficiency claim in light of the following evidence from which the jury could reasonably infer that the victim was passed out (i.e., unconscious) and, therefore, unaware that the act of intercourse was occurring:

J.B. testified that she did not agree to have sex with Glover or to have her clothing removed. Hixenbaugh testified that J.B. “collapsed” in the kitchen and was so intoxicated at the time she was taken into the bedroom [(where J.B. was subsequently raped)] that she could not stand unassisted. She further testified that J.B. was barely mumbling and “making no sense.” She

characterized J.B.'s condition during the drive home as "passed out." Dorien Riddick, another party guest, testified that J.B. "passed out" before being carried to the bedroom. He described J.B. as incoherent and "mumbling a little." Smith also characterized J.B. as "passed out" and "mumbling." He testified that J.B. was carried, with her feet dragging on the floor, into the bedroom. Dr. Gerald Braverman testified that he examined J.B. at the hospital and found her unconscious due to severe intoxication. J.B. was unresponsive to stimulation, lacking eye movement and spontaneous movement of her extremities. Her pupils were fixed and dilated.

Id. at 1125 (citations to record omitted). In other words, the State presented circumstantial evidence from which it could be reasonably inferred that J.B. was incoherent and passed out at the time the defendant engaged in intercourse with her. Thus, she was physically (as well as mentally) incapable of consenting to or participating (in any true sense) in sexual intercourse with the defendant.

We acknowledge that circumstantial evidence alone may be sufficient to support a rape conviction. *See Jones v. State*, 780 N.E.2d 373 (Ind. 2002). Further, the uncorroborated testimony of the victim may be sufficient to sustain a conviction. *Becker v. State*, 703 N.E.2d 696. In the instant case, however, the evidence is simply not sufficient for a trier of fact to infer beyond a reasonable doubt that A.C. was unaware the act of intercourse was occurring. While the evidence certainly establishes that A.C. does not remember the act of intercourse or whether she consented, the evidence does not establish beyond a reasonable doubt that she was passed out or incoherent to the extent she could not consent to sexual intercourse with Cain. In fact, A.C. testified that it was possible she consented but that she just could not remember because she "blacked out." *The Exhibits* at 154. The State asserts that A.C.'s testimony is "just as consistent" with a

state of unconsciousness as it is with a functioning blackout state. *Appellee's Brief* at 4. We agree that this is a reasonable evaluation of her testimony. The State, however, appears to disregard the fact that it (not Cain) had the burden to prove A.C.'s state beyond a reasonable doubt. "Just as consistent" does not cut it. *See Gebhart v. State*, 531 N.E.2d 211, 212 (Ind. 1988) ("[t]he evidence here is insufficient in probative value to warrant the conclusion of a rational trier of fact, to a moral certainty beyond a reasonable doubt.... It might well support that conclusion by a preponderance of the evidence, but then this is a criminal case").

Unlike in *Glover*, the evidence regarding A.C.'s state of consciousness during the relevant period of time is sparse and inconclusive. Moreover, we emphasize that our resolution of this case does not involve a determination regarding A.C.'s credibility. As set forth above, due to intoxication, A.C. simply does not remember the act of intercourse and whether she consented. She admitted at trial that she could have consented.⁴ Further, upon "waking up" and seeing Cain getting off of her wearing a condom, the evidence reveals that A.C. merely pulled up her pants and then remained in Cain's car. *The Exhibits* at 108. A.C. further testified that it did not "really hit [her] what had happened" until the following afternoon. *Id.* at 145. A.C.'s testimony does not establish beyond a reasonable doubt that she was unaware of what was occurring during the act of intercourse with Cain. Moreover, the State failed to present any additional evidence, such as testimony from other partygoers, regarding A.C.'s state of consciousness around

⁴ In contrast, the victim in *Glover* testified that she did not agree to have sex with the defendant.

the time of the alleged rape.⁵ Under the circumstances of this case, we must conclude that the State failed to present sufficient evidence to support a conviction for rape under I.C. § 35-42-4-1(a)(2).

Judgment reversed.

KIRSCH, J., and RILEY, J., concur.

⁵ We note that the only other partygoer who testified, Tiffany Bridges, testified for the defense and indicated she spoke with Cain and A.C. as she (Bridges) was leaving the party around 1:00 a.m. At the time, Cain and A.C. were in Cain's car together. Bridges testified that A.C. was coherent and was laughing and talking with Cain and Bridges. Further, during the sexual assault examination at the hospital, A.C. indicated that she had not passed out.